In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-934

GERALDINE L. FLANAGAN, ET AL., PETITIONERS

v.

McDONNELL DOUGLAS CORPORATION
AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, certain plaintiffs in this tort suit arising out of the crash of an airliner, contend that the court of appeals erroneously issued a writ of mandamus ordering the district court to vacate its certification of their suit as a class action under Rule 23(b)(1)(A), (b)(1)(B), and (b)(2), Fed. R. Civ. P.

On March 3, 1974, a Turkish Airlines DC-10 aircraft crashed near Paris, France, resulting in the deaths of approximately 335 persons. Next-of-kin, survivors, and personal representatives of passengers instituted multiple actions in several districts, naming as defendants McDonnell Douglas (the plane's manufacturer), General Dynamics (the plane's designer), Turkish Airlines, and the United States. The plaintiffs alleged, *inter alia*, that

the United States was liable under the Federal Tort Claims Act for negligent certification of the aircraft by the Federal Aviation Administration. The Judicial Panel on Multi-District Litigation assigned the cases to the United States District Court for the Central District of California (Peirson Hall, J.) for consolidated pretrial proceedings pursuant to 28 U.S.C. 1407. *In re Air Crash Disaster at Paris, France, on March 3, 1974,* 376 F. Supp. 887. The district court subsequently transferred the actions to itself for all purposes pursuant to 28 U.S.C. 1404. In the course of the proceedings in the district court, the court indicated that it intended to send notice to next-of-kin and survivors of all passengers, inviting them to join in the suit. McDonnell Douglas and the United States thereupon filed petitions for a writ of mandamus and/or prohibition to bar issuance of the proposed notices; the court of appeals held that the district court could not issue the notices unless and until the action was properly certified as a class action. *Pan American World Airways, Inc.* v. *United States District Court for the Central District of California,* 523 F.2d 1073 (C.A. 9).

While that mandamus proceeding was pending, the district court entered an order certifying the suit as a class action pursuant to Rule 23(b)(1)(A), (b)(1)(B), and (b)(2), Fed. R. Civ. P. The United States and McDonnell Douglas then filed further petitions for a writ of mandamus challenging the propriety of that order, and also appealed from the order. The court of appeals consolidated the proceedings, granted the petitions for a writ of mandamus, vacated the class action certification, and dismissed the appeals as moot (Pet. App. A2-A7).[1]

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[1]A suggestion for rehearing *en banc* was rejected, three judges dissenting (Pet. App. A8-A10).

1. Petitioners mischaracterize the question presented as whether mass tort suits can ever be maintained as class actions under any provision of Rule 23 (see Pet. 9-14). In fact, the substantive question presented here is whether such suits can be maintained as class actions under subparagraphs (b)(1)(A), (b)(1)(B), or (b)(2) of that Rule, *i.e.*, as coercive class actions in which all prospective plaintiffs are forced to join, or only as permissible class actions under subparagraph (b)(3) of the Rule, which permits prospective plaintiffs to opt out of the suit in order to pursue separate remedies. The district court ordered a coercive class action. The court of appeals correctly ruled only that the subdivisions of Rule 23 allowing class actions of that kind do not "permit certifications of a class whose members have independent tort claims arising out of the same occurrence and whose representatives assert only liability for damages" (Pet. App. A3). In so holding, the court followed its earlier decision in *LaMar* v. *H&B Novelty & Loan Co.*, 489 F.2d 461 (C.A. 9). See also *Causey* v. *Pan American World Airways, Inc.*, 66 F.R.D. 392, 396-399 (E.D. Va.).

Four subdivisions of Rule 23(b) separately provide for the certification of class actions. The first, (b)(1)(A), applies if the failure to certify a class would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." The court of appeals correctly held that this provision does not apply to situations in which many plaintiffs seek individual money damages for separate injuries arising from a single accident. Variant determinations of liability or nonliability for tort damages with respect to such plaintiffs would not establish incompatible standards of conduct for the defendant. Such determinations would mean only that the defendant

would be required to pay damages to some plaintiffs but not to others. As the court of appeals correctly observed (Pet. App. A4):

> [A] judgment that defendants were liable to one plaintiff would not require action inconsistent with a judgment that they were not liable to another plaintiff. By paying the first judgment, defendants could act consistently with both judgments.

The second subdivision, (b)(1)(B), applies to suits that either would be dispositive of the interests of class members not parties to the litigation or would substantially impair or impede such members' ability to protect their interests. As the court of appeals correctly determined, that provision is plainly inapplicable here (Pet. App. A5):

> [C]lass actions are permitted under subdivision (b)(1)(B) only if separate actions "inescapably will alter the substance of the rights of others having similar claims." * * * At worst, individual actions would leave unnamed members of the class with the same complexity and expense as if no prior actions had been brought.

The third subdivision, (b)(2), applies when one party's conduct justifies "appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." This provision by its terms is inapplicable to ordinary tort claims for money damages. Its language cannot be avoided by pleading such claims in the form of a request for a declaration of liability in tort: Rule 23(b)(2) allows class actions for declaratory relief only if that relief corresponds to final injunctive relief, which a declaration of tort liability does not.

For present purposes, the most significant aspect of the foregoing subdivisions of Rule 23 is that they provide no procedure by which a class member who does not wish to be bound by the judgment may opt out of the proceeding. In effect, considerations of equity resulting from the risk of incompatible standards or prejudice to other class members are deemed to outweigh any individual's desire to pursue his own course. In contrast, class actions permitted by the fourth subdivision, (b)(3), which applies generally to all litigation in which "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and * * * a class action is superior to other available methods for the fair and efficient adjudication of the controversy," are subject to procedures for notification to class members that they may either exclude themselves from the class, or appear through their own counsel (Rule 23(c)(2)). Subdivision (b)(3) has not been invoked by the plaintiffs in this case, and therefore the question whether it would be applicable here[2] is not before the Court.

In this case, the district court, by certifying the class under Rule 23(b)(1) and (2), effectively barred nonparties with claims against the defendants from opting out of the litigation in order to pursue their remedies where and when they see fit. See *Air Line Stewards and Stewardesses Association, Local 550* v. *American Airlines, Inc.*, 490 F.2d 636 (C.A. 7) certiorari denied, 416 U.S. 993. As the court of appeals correctly held, this is "inconsistent with any tenable interpretation of Rule 23"

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[2]See Advisory Committee's Note to Rule 23(b)(3) of the Proposed Rules of Civil Procedure, 39 F.R.D. 69, 103.

(Pet. App. A6). Petitioners have been unable to cite any appellate decision or commentator to the contrary.[3]

2. Petitioners further argue (Pet. 14-18) that even if the district court's actions were "a clear abuse of discretion" and "inconsistent with any tenable interpretation of Rule 23," the court of appeals misconstrued the All Writs Act, 28 U.S.C. 1651(a), and Rule 23 in proceeding by mandamus. Contrary to petitioners' suggestion, however, the court of appeals did not hold that class certifications are reviewable by extraordinary writ as a matter of course. Instead, the court recognized the rule, accepted also by the Second and Third Circuits, that mandamus is not ordinarily available to review class certifications (Pet. App. A6). But the court determined that mandamus was uniquely appropriate here as an exercise of its supervisory power over the administration of justice in the district courts, in view of the fact that in certifying the class the district court had ignored directly contrary Ninth Circuit precedent (*ibid.*). This application of the All Writs Act is consistent with the prior decisions of this Court. See, *e.g.*, *Thermtron Products, Inc.* v. *Hermansdorfer*, No. 74-206, decided January 20, 1976, slip op. 16-17; *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 255-260.

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[3]Petitioners' reliance (Pet. 12) on the views of Professor Moore, and Professors Wright and Miller, is misplaced, since both treatises endorse class actions in tort only under Rule 23(b)(3). See 3B Moore's *Federal Practice*, para. 23.45[3] at p. 23-811, n. 35 (2d ed. 1975); 7A Wright & Miller, *Federal Practice and Procedure*, §1783 at p. 117 (1972 ed.).

The only two reported cases cited by petitioners which have held that a Rule 23(b)(1) or (b)(2) class action is proper in a tort suit are the district court decisions in *Petition of Gabel*, 350 F. Supp. 624 (C.D. Calif.) (Hall, J.), and *Hernandez* v. *Motor Vessel Skyward*, 61 F.R.D. 558 (S.D. Fla.), both of which have been criticized by commentators. See 3B Moore's *Federal Practice*, paras. 23.35 and 23.40 at pp. 71-74, 76, 85 (1974 Cum. Supp.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.